IN RE PETER YAP

HIGH COURT, SINGAPORE
WEE CHONG JIN CJ
LAI KEW CHAI J
YONG PUNG HOW J
[ORIGINATING SUMMONS NO. 830 OF 1988]
25 SEPTEMBER 1990

LEGAL PROFESSION: *Payment of brief fee - Trial did not proceed - Negotiation for reduction - Disciplinary committee - Unreasonable attitude of Counsel - Contract of honour.*

The respondent PY an advocate and solicitor, was found guilty by the Disciplinary Committee of the Law Society of Singapore (LSS) under s. 80(2)(b) or alternatively 80(2)(h) of the Legal Profession Act (the Act) for having failed to pay the agreed fee of £50,000 to a Queen's Counsel G. It was agreed between PY and K, a law clerk of G that if the criminal case did not proceed to trial parties would then negotiate the amount of fees payable. The client TKS pleaded guilty to the offence of criminal breach of trust and the criminal case did not proceed to trial.

Pursuant to negotiations between PY and K, PY confirmed the retainer of G on 3 March 1986 for a brief fee of £50,000 with a refresher of £1,500 per day and usual expenses. It was also evidenced that K had agreed with PY that the agreed brief fee would be negotiated if the criminal trial of TKS did not proceed. G however became concerned as a result of rumours that another solicitor from England had been instructed. The trial did not proceed; K requested the payment of the brief fee of £50,000 which was disputed by PY.

G then instituted proceedings against PY for the recovery of the agreed brief fee, this was dismissed on the ground that there was no reasonable cause of action. G then filed a complaint with the LSS; his claims were all based on breach of the unconditional obligation to pay the agreed brief fee and allegations that PY had practised a deception on him by engaging other Counsel. The LSS formulated 4 charges and called only K as a witness and accepted K's evidence that PY, did not inform K at any time that G's services would not be required.

The LSS held that there was a binding agreement between K and PY for G to appear at the defence of TKS for brief fee as alleged. At the request of PY, the hearing of the DC was adjourned *sine die* whereby PY offered £10,000 to G as settlement. K replied on G's behalf requesting a payment of £25,000. The DC then considered the LSS Practice Directions and Ruling No. 47 of 1984 and various other materials on payment of Counsel's fees.

Held:

[1] The intransigent uncompromising attitude of G left no room for any meaningful negotiations; his belief that PY had replaced him G, with another Counsel had no evidential foundation whatsoever.

[2] G was also under a duty of honour to negotiate in view of the fact that the criminal case against TKS was not proceeding, this he G did not do. In addition his assertions, up to 5 May 1988 as to PY's having instructed another Counsel and that PY had received payment from TKS were totally unreasonable.

[3] The misfortune encountered by PY stemmed from a failure on the part of G in conceding or at least mentioning at the first available opportunity that it was agreed that the fee would be negotiable if the case did not proceed to trial; this was perplexing as PY had from the start of the controversy, asserted that the fee was in the circumstances negotiable.

[4] (a) The DC had misdirected themselves by finding that PY had failed to pay the agreed fee of £50,000 in a contract of honour it is as much a matter of honour to pay as it is no less a matter of honour to negotiate in the event of a condition subsequent coming to pass.

(b) PY did not fail to pay the fee because it was never payable; G had failed to negotiate in any meaningful way and his overly robust response in the matter had stood in the way of a settlement of a reasonable amount of the fee.

[Respondent not to be dealt with under the Act; nor order as to costs in the High Court or before the DC.]

Cases referred to:
Morris v. Hunt [1819] 1 Chit 544
Re Le Brasseur & Oakley [1896] 2 Ch 487
Rondel v. Worsley [1969] 1 AC 191
Kennedy v. Brown [1863] 13 CB (NS)
Rondel v. Worsley [1967] 3 WLR 1666

Legislation referred to:
Legal Profession Act [Sing], ss. 80(2)(b), (2)(h)

Other source referred to:
Halsbury's Laws of, England 4th Edn. para 1201

For the respondent - Lee Han Yang
For the law society of Singapore - K S Rajah

JUDGMENT

Wee Chong Jin CJ, Lai Kew Chai J, Yong Pung How J:

The respondent, an advocate and solicitor, was charged before and found guilty by the Disciplinary Committee of the Law Society of grossly improper conduct in the discharge of his professional duty within the meaning of s. 80(2)(b) or, alternatively, s. 80(2)(h) of the Legal Profession Act ("the Act"). The Disciplinary Committee found him guilty of having failed to pay the agreed fee of £50,000 to a Queen's Counsel as raised by the Q.C.'s fee note of 4 April 1986. In the course of these proceedings before us, it was incontrovertibly clear that the Disciplinary Committee had found that a condition of the retainer, as agreed between the respondent and the clerk of the Q.C., was that if the criminal case for which the Q.C. was retained did not proceed to trial parties would then negotiate the amount of fees payable. In the event, the criminal case did not proceed to trial as the lay client, one Tan Koon Swan, eventually pleaded guilty to the offence of criminal breach of trust. As it transpired, and it was beyond dispute, neither the Q.C. nor his clerk had attempted to negotiate with the respondent in any meaningful way. We came to the conclusion that the Q.C. did not keep his side of the agreement of honour. We accordingly declared that the respondent had conclusively shown why he should not be dealt with under the Act and ordered, however, that there be no order as to costs in the High Court or before the Disciplinary Committee.

The respondent is an advocate and solicitor of 18 years standing and the sole proprietor of his firm. He was retained by Tan Koon Swan who had been charged with several serious offences arising out of the collapse of the Pan Electric group of companies. On 12 February 1986 the respondent telephoned Mr. Roy Kemp, the managing clerk to Mr. Gilbert Gray Q.C. to retain Mr. Gray to lead the defence of Tan Koon Swan. The trial was scheduled to commence

on 5 May 1986 and was expected to continue for five weeks. Mr. Kemp informed the respondent that Mr. Gray could be made available provided the respondent could confirm the retainer as Mr. Gray had another **cause celebre**, the "*Brighton Hotel Bombing*" case in London, which would clash with the dates on which he was required in Singapore. Mr. Kemp was prepared to return that brief if the respondent would confirm the retainer. By a telex sent on 3 March 1986 the respondent confirmed the retainer. Upon receipt of the confirmation Mr. Kemp returned the briefs covering the relevant period, including the brief for the "*Brighton Hotel Bombing*" case.

We turn to the terms of the retainer. Mr. Gray's brief fee was £50,000 with a refresher of £1,500 per day, plus the usual expenses which included a return air ticket, hotel expenses, meals and incidental expenses. It was also agreed that Mr. Gray would be available for three weeks before the trial for pre-trial consultations but only those consultations held during the week before the trial would be covered by the agreed brief fee.

It was only at the hearing before the Disciplinary Committee in April 1988 that an important term of the retainer emerged. Mr. Kemp, the only witness called by the Law Society, in his evidence disclosed for the first time that after his receipt of the respondent's telex of 3 March 1986 he had agreed with the respondent that the agreed brief fee would be negotiated if the criminal trial of Tan Koon Swan did not proceed. We set out his evidence as follows:

> When I received Mr. Yap's telex of 3 March 1986 I had a telephone conversation (with the respondent) and he agreed that the brief fee would become payable. I think it is fair to say that at that point, he did mention there was a very slim chance of the case, that the case may not go ahead as a trial. He said that there were negotiations going on at Government level to endeavour to resolve the matter and he asked if there would be any reduction in the fee should the case go short - if Mr. Gray need not go to Singapore.
>
> My reply was, that would depend on what point of time he said that Mr. Gray would not be required. I think it was actually said that if it happened in the next week or so that we may be able to agree to half the brief fee. It would really depend on how near to the actual date it was; the nearer one got to the actual trial date obviously the shorter the time to replace his work with other work.

On 21 March 1986 Mr. Kemp telephoned the respondent and informed him that Mr. Gray had completed a case in Singapore and asked whether the respondent was in a position to deliver the papers to Mr. Gray or have a consultation with him. The respondent replied that he was not in a position to have consultations yet as negotiations were still continuing; these consultations must have been intensive seeing that the trial of Tan Koon Swan was scheduled to begin on 5 May 1986. The respondent did not terminate the retainer of Mr. Gray.

What followed was a most unfortunate misunderstanding which, as will be seen, was the *fons et origo* of the dispute between Mr. Gray and the respondent and the reason why the matter was not more sensibly resolved. On 25 March 1986 Mr. Gray who was in Singapore obviously acted on what he had heard through the grapevine and telephoned the respondent and asked the respondent if another Counsel had been engaged. This the respondent denied. The respondent told Mr. Gray that the matter was being settled and that his services were no longer required. According to the respondent, who was not contradicted by Mr. Gray, he told Mr. Gray that he would negotiate the fee payable as the matter was settled; Mr. Gray appeared to have accepted the decision and had asked him to talk to Mr. Kemp about it. Towards the end of March 1986 Mr. Gray rang the respondent again. He sounded very annoyed and accused him of having engaged another Counsel to lead the defence in his

place. The respondent told Mr. Gray that his client, a man with many connections, was consulting with or was referred to many Q.C.s over his many matters. The respondent also told Mr. Gray that as far as he was concerned if the matter had gone for trial Mr. Gray would lead the defence. Mr. Gray did not appear convinced. The respondent said in evidence: "He was very loud in his discussion with me. I was getting quite upset by the manner that the conversation was going."

Kemp then told the Disciplinary Committee:

> When Mr. Gray returned to England and as a result of what he told me I spoke to a clerk in the chambers of Mr. Clive Nicholls, Q.C. and his clerk confirmed that Mr. Nicholls together with a junior barrister from his chambers had been advising, in fact had been booked by Mr. Yap in mid February, and Mr. Nicholls had been advising at various times between then and April - Mr. Nicholls I think was in a case in Hong Kong at the time and had flown across here on several occasions to advise - the junior barrister had in fact been in Singapore advising Mr. Yap and his client for the last four weeks as at that time, I think he had also been in Kuala Lumpur. Mr. Nicholls had been in Singapore but not for the whole period because he was in a case in Hong Kong. He had flown across, I am not sure for what period, but he had certainly been here to advise.

It was obvious that what Mr. Kemp was told by the clerk of another set of chambers was entirely hearsay evidence. The respondent was not contradicted in his evidence that Mr. Clive Nicholls was never engaged to lead the defence of Tan Koon Swan and that Mr. Gray was chosen by lay client to lead the defence since he had experience appearing in the Courts in Singapore.

On 4 April 1986 Mr. Kemp wrote to the respondent enclosing a fee note for the brief fee of £50,000. The letter was in these terms:

> Peter Yap & Co.
> Advocates & Solicitors
> 14 Robinson Road #02-01/02
> Far East Finance Building
> Singapore 0104.
>
> 4 April 1986
>
> Dear Mr. Yap,
>
> **Re: Tan Koon Swan**
>
> In mid February you contacted me by telephone enquiring if Mr. Gilbert Gray, Q.C. would be available to conduct a criminal case on behalf of the above-named. Several telephone calls followed when fees were agreed and eventually you confirmed the engagement of Mr. Gray. This was confirmed by telex dated 3 March 1986.
>
> During the course of these telephone conversations I confirmed that Mr Gray could be made available for up to three weeks prior to the hearing as well as for the hearing itself but that as I had promised solicitors in England decisions on Mr Gray's availability during this period in particular a brief in the *Brighton Hotel Bombing* case, I asked for your confirmation as soon as possible.
>
> As a result of your telex of 3 March I have kept Mr Gray clear for a period of 8 weeks and declined several briefs which have been offered.
>
> On 21 March I telephoned to advise you that Mr Gray had completed his case in Singapore and was now available if you required consultations. You advised me that you were now hopeful that the case would be settled and Mr Gray may not now be required.

Before Mr Gray left Singapore on 2 April he contacted you and discussed the situation with you. He expressed his concern because he had heard that another solicitor from England had been instructed and you said that this was not the case.

I am now told that Mr Clive Nicholls Q.C. and a junior from his chambers were instructed by you in February and have been advising in the case since then. Indeed the junior has been with you in Singapore and Kuala Lumpur for the last 4 weeks.

In the circumstances I enclose a fee note for the agreed brief fee and I should be obliged if you would arrange for payment by the 30 April 1986.

Yours faithfully,

R Kemp
Clerk to Mr G Gray, QC

On 28 April 1986 the respondent replied as follows:

Peter Yap & Co
Advocates & Solicitors

28 April 1986

Mr Roy Kemp
2 Park Square
Leeds LSI 2 NE
United Kingdom

Dear Sir

Tan Koon Swan

I refer to your letter dated 4 April 1986.

You will recall that when we were discussing the fees for Mr Gilbert Gray QC I indicated quite clearly to you that in the event there was a likelihood of settlement of the case before papers were handed over to Mr Gray, we would have to discuss the appropriate fee, if any, to be paid by client. The hearing was to commence on 5 May 1986 and was expected to last 5 weeks. The brief fee of £50,000 would also include a pre-trial conference in Singapore for 3 weeks without refresher.

Some two weeks or so after my telex to you of 3 March 1986 I informed you by telephone that Mr Gray would not be required for the case. Up to that point of time, no papers had been delivered to him. I had no consultation with him on the case and received no opinion from him. Mr Gray telephoned me sometime after my telephone conversation with you, when he was in Singapore on some other matter, and I confirmed to him what I spoke to you previously on the phone that his services will no longer be required. As for the other matters raised by you in your letter, I reserve my comments.

In view of the premises, I do not see how you could send me a fee note of £50,000.

Yours faithfully,

Sgd. Peter Yap

The above exchange of correspondence was followed by Mr Gray's suit instituted in the High Court against the respondent for the recovery of the agreed brief fee. By paras. 10 and 11 of the statement of claim, it was averred by Mr Gray that the respondent's statement that no other Counsel had been instructed for the case "was false" as another leading Counsel, Mr Clive Nicholls QC, had been instructed for the defence of Tan Koon Swan prior to 25 March 1986 and that an English Barrister had also been instructed as junior Counsel. The

claim was based on breach of contract and there were serious allegations that the respondent had replaced Mr Gray with another leading Counsel without prior notice and had deceived Mr Gray when asked about it. It was surprising that Mr Gray had instituted legal proceedings to recover his fees because there is, as he and every Counsel ought to know, a rule of law of long antiquity that there is no contractual relationship between a barrister and either the instructing solicitor or the client upon which he can sue; it is a contract of honour: see *Morris v. Hunt* [1819] 1 Chit 544; *Re Le Brasseur and Oakley* [1896] 2 Ch 487 at 494, CA, per Lindley LJ; and *Rondel v. Worsley* [1969] 1 AC 191 at 236, 261, 278 and 287.

In *Kennedy v. Brown* [1863] 13 CB (NS) Erle CJ said at p. 727 that:

> a promise by a client to pay money to a Counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of Counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

Referring to all previous records of the law Erle CJ noted at p. 728:

> there is no trace whatever either that an advocate had ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate.

The *Kennedy v. Brown* rule of law was affirmed by the House of Lords in *Rondel v. Worsley* [1967] 3 WLR 1666. Lord Upjohn said at p. 1716-7:

> ... it is clear that Counsel cannot sue for his fees. This has been established for nearly two hundred years and it is usually put upon the ground that a barrister is of too high an estate to condescend to the common arena to sue his client. Fees must be regarded as pure honoraria (...). It is true that Bayley J in *Morris v. Hunt* (*supra*) put it on a more realistic though humdrum basis that Counsel should ensure that he is paid before the case and the matter should not be left to chance afterwards, so that he cannot thereafter maintain an action; not a very good reason. Best J in the same case really put the inability of Counsel to sue upon the ground of public policy, namely, that Counsel should not thereby have any temptation to endeavour to get a verdict. However, whatever reason may be ascribed it is clear that Counsel cannot sue for his fees ...

Inevitably, Mr Gray's suit was dismissed with costs on the ground that there was no reasonable cause of action.

Mr Gray thereafter filed a complaint with the Law Society of Singapore against the respondent. By his letter of 30 January 1987 to the Law Society he enclosed his statutory declaration in support of his complaint and the exhibits, including the cause papers, which he hoped would adequately set out the nature of his complaint. The complaint so far was not only for failure to pay his fees but it also included allegations that another Counsel had been engaged and deceit.

We have to note, and it should have been noted, that up to this stage of the proceedings Mr Gray did not refer to the agreement between Mr Kemp and the respondent that if the criminal case did not proceed to trial both parties were obliged to negotiate a reasonable fee. His claims so far were based on breach of the unconditional obligation to pay the agreed brief fee and on his allegations that another leading Counsel had been engaged and that the respondent had practised a deception on him.

The statement of the case of the Law Society against the respondent repeated what was alleged in Mr Gray's statement in claim in the High Court. As a result of which, the Law Society formulated four charges against the respondent, as follows:

First Charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s. 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you failed to pay the agreed brief fee of Pds 50,000 (Pounds) due to Counsel Mr Gilbert Gray QC and evidenced by a fee note dated 4 April 1986.

Second Charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s. 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you on or about 3 March 1986 engaged the services of Mr Gilbert Gray QC as Counsel for the defence in the case against Mr Tan Koon Swan without first informing him that Mr Clive Nicholls QC had already been retained as Counsel.

Third Charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s. 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you on or about 3 March 1986 engaged the services of Mr Gilbert Gray QC as Counsel for the defence in the case against Mr Tan Koon Swan without discharging Mr Clive Nicholls QC who had been engaged to prior to Mr Gilbert Gray QC.

Fourth Charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s. 80(2)(b) or alternatively (h) in that on 25 March 1987 you lied and misled Mr Gilbert Gray QC into believing that other Counsel had not been retained when other Counsel had in fact been retained in the case against Mr Tan Koon Swan.

The Disciplinary Committee heard the matter for 2 days at their first sitting. The Law Society called only one witness, Mr Roy Kemp. The respondent gave evidence. On the only issue of fact in dispute, the Disciplinary Committee accepted the evidence of Mr Kemp that the respondent, contrary to his claims, did not inform Mr Kemp at any time that Mr Gray's services would not be required. This finding of fact is unchallenged but, in our view, it had hardly any materiality on the attitude of Mr Gray because from as early as the end of March 1986, long before 5 May 1986 when the Tan Koon Swan trial was scheduled to begin, he had thought and had acted on the basis that he was out of the case. Mr Gray had taken the view, quite erroneously as it turned out, the respondent had surreptitiously engaged another Counsel and that the respondent had deceived him about this. Further, and at any rate, by 4 April 1986 Mr Kemp had sent the fee note on the basis that Mr Gray would no longer be concerned with the *Tan Koon Swan* case.

No evidence was led before the Disciplinary Committee on the second, third and fourth charges. It inevitably followed that the respondent was found not guilty of those rather serious charges.

In relation to the first charge, the Disciplinary Committee, after hearing the evidence and submissions, indicated that they were finding as a fact "that there was a binding agreement" between Mr Kemp and the respondent for Mr Gray to appear for the defence at the trial of Tan Koon Swan for a brief fee of £50,000 plus a refresher of £1,500 per day and the usual travelling and hotel expenses. The Disciplinary Committee went on to find that "(t)here was an understanding between them that in case Tan Koon Swan's trial was not proceeded with and Mr Gray's services were not required, the brief fee could be re-negotiated i.e. that the respondent would be entitled to ask for a reduction of the fee of £50,000." The Disciplinary Committee then recognised "that as this was essentially a dispute about the proper fee

payable in the special circumstances of this case" and they took the view that it would not be out of order for the committee to "request" the respondent to make the effort to come to a settlement with Mr Gray. The Chairman of the Disciplinary Committee addressed the respondent as follows:

> The committee having heard the evidence is satisfied that you have agreed with Mr. Kemp the clerk to Mr Gray that a brief fee of £50,000 is payable in respect of the TKS brief. At the time of the agreement there was an understanding that you could ask for a reduction of the fee in the event of a settlement.
>
> You have given a number of reasons for the failure to take up the matter of a reduction of the brief fee. One of the reasons given is your concern that such negotiation after the complaint had been lodged might be improper. The committee is of the view that a genuine effort on your part to negotiate a reduction of the fee even at this stage would not be improper and would be a mitigating factor.
>
> The committee is prepared to give you an opportunity to negotiate a reduction in the fee if you are so inclined. Would you like an adjournment to enable you to do so?

The hearing of the Disciplinary Committee was at the request of the respondent adjourned *sine die*. At the resumed hearing the following correspondence exchanged between the respondent and Mr Gray were produced. The respondent's letter of 25 April 1988 stated:

> Peter Yap & Co
> Advocates & Solicitors
>
> Mr Gilbert Gray QC
> 4 Paper Buildings
> Temple
> EL4Y 7EX
>
> Dear Mr Gray,
>
> At the conclusion of the hearing of your complaint before the committee, it was suggested that I could communicate with you to see whether we could agree on a sum to be paid to you regarding my instructions in March 1986 to lead the defence of my client, Mr Tan Koon Swan.
>
> My client as you may be aware pleaded guilty to a reduced charge, was fined S$500,000 and sentenced to 2 years imprisonment. Upon his release from prison in Singapore in December 1987, he was immediately rearrested by the Malaysian authorities and after similar proceedings in Kuala Lumpur was again sent to prison this time for 2½ years. He is now serving his term and the fine of RM1,000,000 which was imposed on him remains unpaid.
>
> There are also pending against him, several civil actions from financial institutions and stockbroking firms both in Malaysia and Singapore and a bankruptcy petition has in fact been served on him by a judgment creditor.
>
> I must also inform you that I received no monies to account of costs either in connection with your fees or my fees and I had myself expended on his behalf a fairly substantial sum of money by way of disbursements and other expenses. I have mentioned to Mr Roy Kemp at the Supreme Court Building in Singapore, at the conclusion of the abovesaid hearing, that if we had commenced negotiations upon receipt of my said letter of 28 April 1986, I might have been able to recover some fees from my client.
>
> In view of all the circumstances of this case I am unable to offer you more than £10,000 to settle your fees. The whole of the sum will of course have to come from my own resources. I hope that you will accept my offer.

In addition I would like to take this opportunity to express my personal apologies to you.

As I intend to keep the committee informed of this development, all communications in this regard may be brought to their attention, if necessary.

Yours faithfully

Sgd. Peter Yap

Mr Kemp replied on 5 May 1988 in the following terms:

Park Court Chambers
40 Park Cross Street
Leeds LS1 2QH
0532 433277

Mr P. Yap
Peter Yap & Co
Advocates & Solicitors
14 Robinson Road
#02-01/02, 2nd Storey
Far East Finance Building
Singapore 0104

Dear Mr Yap,

Thank you for your letter of 25 April 1988. I have discussed the matter with Mr Gray.

Before booking Mr Gray you ought to have ensured that you were in funds to do so. Your present predicament is self-inflicted. You caused Mr Gray to return other well paid work in a cause celebre and in reliance upon you he altered his position to his great disadvantage. Furthermore, you told Mr Gray that you had not instructed other Counsel when in fact you had.

The responsibility for the present position is yours, but Mr Gray and I feel that a payment by you of one-half of the agreed fee together with the expenses incurred by me in attending to give evidence in Singapore would be a fair and honourable compromise between two professional men.

I have forwarded a copy of this letter to Mr Arul for use at the adjourned hearing if necessary.

Yours sincerely,

Sgd. Roy Kemp
Clerk to Mr Gilbert Gray QC

The respondent did not give a prompt reply to Mr Kemp who wrote a further letter dated 12 May 1988 to the respondent as follows:

Park Court Chambers
40 Park Cross Street
Leeds LS1 2QH
0532 433277

Mr P. Yap
Peter Yap & Co
Advocates & Solicitors
14 Robinson Road
#02-01/02, 2nd storey
Far East Finance Building
Singapore 0104

Dear Mr Yap,

I have not received a reply to my letter of 5 May 1988.

I now have reason to believe that you have received considerable funds both from your client and from collections made on his behalf in Malaysia and that part of these funds, approximately RM220,000 was paid to you to cover Counsel's fees. These could not have been for Mr Clive Nicholls, QC because as you stated at the disciplinary hearing, his fees were paid direct by your client. It appears therefore that you have received payment of Mr Gray's fees.

In an endeavour to resolve this matter quickly before the adjourned hearing Mr Gray agreed to reduce his fees from £50,000 to £25,000. This is the very minimum fee Mr Gray would have expected if the case had been resolved at an early date and proper notice given and ignores the fact that you did not give proper notice or advise us of other Counsel's involvement.

I have discussed this matter further with Mr Gray and notwithstanding the new information, he is prepared to allow the offer contained in my letter of 5 May to stand on your undertaking to return the balance of the fees received by you on his behalf to your client.

A copy of this letter has been forwarded to Mr Arul for use at the adjourned hearing if necessary.

Yours sincerely,

Sgd. Roy Kemp
Clerk to Mr Gilbert Gray QC

Counsel for the respondent before the Disciplinary Committee described the allegation that the respondent had received RM220,000 as "scurrilous". The Disciplinary Committee, quite rightly, declined to investigate Mr Kemp's allegation as this was no part of the case of the Law Society.

The Disciplinary Committee then considered the following passages regarding the responsibility of a solicitor for payment of Counsel's fees. The Law Society of Singapore's Practice Directions and Ruling 1984 stated:

47. Responsibility for payment of charges of foreign solicitors instructed by Singapore law firms.

The council's attention has been drawn recently as to the responsibility for payment of charges of foreign solicitors instructed by Singapore legal firms.

The council would draw the attention of solicitors to the general rule that where a lawyer engages a foreign colleague he is responsible for the payment of the latter's charges unless there is express agreement to the contrary. This rule should always be followed in all cases where there is reciprocity as for example between Singapore and the United Kingdom and Singapore and Australia.

Paragraph 1201 of Vol. 3 *Halsbury's Laws of England*, 4th Edn. states:

Para. 1201. Fees not legally recoverable

A barrister may complain to the council of the Law Society if his fees are in arrear and he has been unable, after reasonable efforts, to obtain payment, irrespective of whether the solicitor has received money from the client for their payment; and while the council will not act as a debt collecting agency for barristers, it is prepared to consider complaints which might show that there has been a breach of etiquette. Where Counsel delivers a fee list to a solicitor the fees should be paid or challenged within three months, whether or not the solicitor has been put in funds by his client or has taxed his costs.

Note 1. It is part of the etiquette of his profession that a solicitor is personally liable for the payment of a barrister's fees whether or not he has received money from his client to pay.

Cordery on Solicitors, 17th Edn., p. 307 states:

The practice of solicitors

A solicitor is personally responsible for payment of Counsel's proper fees whether or not he has received the money from his client with which to pay the fees. Failure to pay Counsel's fees is treated by the Council of the Law Society as a breach of professional conduct for which the usual sanctions apply. A solicitor who fails to pay Counsel's fees, when the council call upon him to do so, lays himself open to disciplinary action ...

The professional liability of a solicitor for payment of Counsel's fees is also stated by the council of the Law Society of England in its publication "The Professional Conduct of Solicitors" as follows:

16.06 Principle

Except in legal aid cases, a solicitor is personally liable as a matter of professional conduct for the payment of Counsel's proper fees, whether or not he has been placed in funds by his clients.

Commentary

1 In general, a barrister can only accept instruction through a solicitor. A barrister does not have a contractual relationship with the instructing solicitor or the client and therefore cannot sue for his fees. He is, however, entitled to demand payment of the fee with his brief except in legal aid cases.

2 In non-legal aid cases, where there is no special agreement, Counsel's fees must be paid or challenged within three months of the delivery of the fee note as the conclusion of the case, whether or not the solicitor has been put in funds by his client or has taxed his costs. The Senate have issued guidelines relating to the appropriate procedures for obtaining prompt payment of barristers' fees.

It should be noted that the non-payment of such fees may be raised as a matter of professional conduct and result in disciplinary action against the solicitor.

The determination of the Disciplinary Committee was put in the following terms:

On the evidence before it, the committee finds that the respondent's difficulties are of his own making. First of all, before booking Mr Gilbert Gray, QC the respondent should have ensured that he was in funds to do so. This was especially so because the brief fee was the substantial sum of £50,000 and Mr Roy Kemp had made it quite clearly that as the respondent was confirming the booking, the brief fee "was now payable" because he would clear Mr Gray's diary for days on which Mr Gray was required in Singapore for the trial of Tan Koon Swan and reject the other equally substantial brief offered to Mr Gray in the "*Brighton Hotel Bombing* case" which was to be heard at or about the same time. In those circumstances, after confirming the booking of Mr Gray, it was imperative for the respondent to obtain straightaway sufficient funds from his client to meet this commitment. The respondent failed to do this.

Secondly, when his client Tan Koon Swan decided to plead guilty, the respondent should have at once informed Mr Gray's clerk, Mr Roy Kemp, that Mr Gray's services would not be required. This again the respondent failed to do.

When the respondent received the letter of 4 April 1986 from Mr Roy Kemp enclosing a fee note of £50,000 the respondent should have requested Mr Kemp for a reduction of the fee or made a counter offer on the ground that his client's trial did not proceed and Mr Gray's services were not utilised. This again the respondent did not do.

The respondent knew very well that he was under an obligation to pay Mr Gray's brief fee of £50,000 that as his client's trial did not go on and Mr Gray's services were utilised, he was entitled to re-negotiate and ask for a reduction in the fee but he made no effort at all to do so. The onus was on him to re-negotiate and get a reduction of the brief fee which he had committed himself to pay. In the absence of re-negotiation the fee payable remained at the full sum of £50,000.

Accordingly, the committee finds the respondent guilty on the first charge formulated against him by the Law Society which is as follows:

First Charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s. 80(2)(b); alternatively, s. 80(2)(h) of the Legal Profession Act (Chapter 161), in that you failed to pay the agreed brief fee of £50,000 (Pounds) due to Counsel Mr Gilbert QC and evidenced by a fee note dated 4 April 1986.

The committee finds the respondent not guilty on the second, third and fourth charges.

For these reasons the committee determines under s. 90(1)(c) of the Legal Profession Act that cause of sufficient gravity for disciplinary action exists under s. 80 of the Act. The committee is conscious of the fact that during the course of these proceedings and at the suggestion of this committee, the respondent did try, though unsuccessfully, to come to a settlement with Mr Gilbert Gray QC on the matter of his brief fee of £50,000 in an attempt to mitigate his misconduct. The committee expresses no opinion on the offer and the counter offer made in the said attempt at settlement of the brief fee.

As Mr Gray's brief fee remains unpaid the committee considers the matter sufficiently grave to warrant disciplinary action. It is grossly improper conduct in the discharge of his professional duty for a solicitor to brief a Queen's Counsel, agree to his brief fee, confirm his booking, agree that "the fee is now payable", cause him to give up other briefs, fail to inform him that his services will not be required and in the end fail to pay him his fee, not even a reduced fee which Counsel was prepared to accept in full settlement. In the opinion of this committee, the matter cannot be lightly treated and accordingly this is not a suitable case for a reprimand under s. 90(1)(b) of the Legal Profession Act.

We agree with the Disciplinary Committee that solicitors should in their own interest and as a matter of prudence ensure that their lay clients had placed them in sufficient funds to meet their professional commitment unless they have good and sound reasons to believe that their lay clients are good for their money. It is a matter of judgment for them. We also agree that the respondent should have informed Mr Kemp as soon as it became reasonably clear that Mr Gray's services were no longer necessary; but the delay in this case was inconsequential and would only have increased the amount of the reasonable fee to be negotiated. We also agree with the Disciplinary Committee that the respondent had a duty to negotiate in good faith with Mr Kemp acting for Mr Gray. The intransigent and uncompromising attitude of Mr Gray, in our view, left no room for any meaningful negotiations. He believed that the respondent had replaced him with another Counsel under what he believed to be reprehensible circumstances and that the respondent had been dishonest about it. His belief had no evidential foundation whatsoever. Mr Gray was also under a duty of honour to negotiate in view of the fact that the criminal case against Tan Koon Swan was not proceeding. Instead, he refused to accept that the criminal case was not proceeding to trial and he persisted,

without any justification, in his allegation that another Counsel had been retained to appear at the trial when, in truth and in fact, Tan Koon Swan had pleaded guilty and was sentenced to a term of imprisonment for two years.

When the Disciplinary Committee finally recognised that this was essentially a dispute over the amount of the fees payable and that the respondent should negotiate, Mr Gray's totally unreasonable response made any further negotiation impossible. He continued to assert as late as 5 May 1988 that the respondent had instructed another Counsel. Most inexplicably, he also through Mr Kemp introduced a new allegation that in fact the respondent had received from or for the account of Tan Koon Swan the sum of RM220,000 to cover the fees payable to Mr Gray. Finally, Mr Kemp on his instructions offered to accept £25,000 on the respondent's "undertaking to return the balance of the fees received to your client". It was an impossible condition for the respondent to accept, unless he had received payment from or for the account of his lay client, and at the hearing before us there was absolutely not an iota of evidence that he had.

The misfortune encountered by the respondent stemmed from a failure on the part of Mr Gilbert Gray, QC in conceding or at least mentioning at the first available opportunity that it was agreed that the fee would be negotiated if the criminal case did not proceed to trial. This failure was perplexing to us as the respondent had from the start of the controversy asserted that the fee was in the circumstances negotiable. This failure was not put right until the clerk of the QC disclosed for the first time in evidence under oath before the Disciplinary Committee that at the time of the retainer he had reached that understanding with the respondent. The Disciplinary Committee in spite of their finding as a fact that there was such a term in the retainer did not take into consideration the failure and refusal of the QC to negotiate with the respondent. Instead they misdirected themselves by finding that the respondent had failed to pay the agreed fee of £50,000. In a contract of honour it is as much a matter of honour to pay as it is no less a matter of honour to negotiate in the event of a condition subsequent coming to pass. The respondent did not fail to pay the fee because it was never payable; Mr Gilbert Gray, in fact, failed to negotiate in any meaningful way and we have to say that his overly robust response in the matter had stood in the way of a settlement of a reasonable amount of the fee.

Also found at [1990] 2 CLJ 1072